

Legislation to Ease Confusion of Return-to-Work Procedures

May 01, 2008

A California bill aimed at better educating employers about how to properly return employees to work after a debilitating injury or illness has the broad support of lawmakers on both sides of the aisle. AB 2181 would direct a trio of state agencies to compile a guidebook to help employers navigate the complex alphabet soup of state and federal laws governing the return-to-work (RTW) process.

California has one of the worst RTW records in the nation, according to a recent study by the Rand Corporation, and that is costly for employers. Legal sources say missteps in compliance with proper RTW procedures can result in substantial losses, regardless of intent.

"The bottom line is that these are just very expensive lawsuits," says Mary Farrell, a partner with the Sacramento firm Murphy Austin Adams Schoenfeld LLP, pointing out that awards of opposing counsel's legal fees for disability discrimination suits often cost dearly. "You can have a \$30,000 recovery and six figures in attorneys fees that are awarded to employees."

The RTW laws apply to both injuries and illnesses sustained on the job or off. The reason for high legal costs in the case of on-the-job injuries is that lawsuits alleging failure to provide RTW fall outside of the workers' comp bargain, meaning cases are heard in civil courts, not before the Workers' Compensation Appeals Board. There are no limits on damages and punitive damages are also a possibility in trial courts, unlike in the workers' compensation system.

San Francisco-based advocacy group Small Business California (SBC) is sponsoring the legislation, which is expected to pass. SBC president and business owner Scott Hauge says his organization's members and small business owners in general usually lack dedicated HR departments and in-house lawyers and often get tripped up by the process.

The guide would be made available electronically on the Division of Workers' Compensation (DWC)'s Website, and the legislation also would require workers' compensation insurers to mail a hardcopy to employers upon their first claim for disability benefits. DWC would work with the Department of Fair Employment and Housing (DFEH) and the Commission on Health and Safety and Workers' Compensation (CHSWC) in drafting the booklet.

SBC's legislative advocate, Lori Kammerer, says many business owners, for example, mistakenly believe their workers' compensation policies cover liability under the Fair Employment and Housing Act (FEHA).

SBC is currently hashing out the details for the guidebook, she says.

"We're already in the process of talking about what needs to be in there. [The agencies] most likely will put together a small advisory group made up with experts," Kammerer says.

The Complex Web of RTW Procedures

When a worker suffers a debilitating injury or illness, the employer must consider its obligations under state statutes such as FEHA, the California Family Rights Act (CFRA) and Labor Code Section 132a (governing workers' compensation), as well as federal laws like the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Unlike discrimination against racial minorities or other protected classes, plaintiffs in disability discrimination suits do not have to prove intent, only that the employer did not satisfactorily accommodate them, attorneys say.

A related article in today's California Executive explores practical guidelines for employers tackling the RTW process, similar to what AB 2181 would mandate, but attorneys and supporters of the bill say compliance is no easy feat.

"People just make bad choices because they don't always have the right information," says Willie Pelote, assistant director of political action for the American Federation of State County and Municipal Employees (AFSCME), adding that ambiguity in RTW-related laws hurts employees as well as employers.

Hauge says one of the most confusing steps for an employer trying to return a disabled employee to work is the so-called "interactive process" of determining appropriate accommodations and/or reassignments. Even if it is clear a disabled employee is no longer fit for a position within the company, he says, simply ending the relationship can result in a wrongful termination suit.

Another issue is the overlap of federal and state laws, Farrell says.

"I've been an employment lawyer for 14 years and it confuses employers of all sizes," she says.

Signed, Sealed, Delivered?

Assemblywoman Ira Ruskin (D-Los Altos), who introduced AB 2181, says the bill does not face any known opposition and awaits a hearing on May 7, which will determine whether it moves to the floor or goes into the suspense file to figure out its cost. He says the mandate's price tag likely will be "minor" and shouldn't raise eyebrows in Sacramento.

An analysis prepared for the bill's April 16 hearing before the Assembly Committee on Insurance lists no formal opposition. In addition to SBC and AFSCME, supporters include Berkeley Police Associates, the California Fence Contractors' Association and the Engineering Contractors' Association.

Although the legislation would involve businesses of all sizes (and attorneys say even large corporations have difficulty complying with RTW procedures), Ruskin says it is particularly aimed at helping smaller entities with limited resources.

"This booklet will enable the small business owners or administrators to understand what the best practices are and will give employers information on how to comply with the laws they might not know," Ruskin says. "It also can reduce their liability and lawsuits."

Ruskin says the state agencies plan to work with small businesses, preferably in the form of an advisory group as mentioned SBC's Kammerer, to decide what to include in the booklet. The Assembly's Small Business Advisory Group, he says, expressed unanimous support for the bill and likely will have a hand in creating the booklet.

Representatives from both DFEH and DWC declined to comment on the bill when asked how they might approach the creation of the RTW guidebook, citing policies that bar public comment on pending legislation.

For explanations of the machinations of the various laws triggered by the RTW process and practical advice from employment attorneys, see the accompanying article in today's edition.

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